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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO**

ZYNGA INC.,

Plaintiff,

v.

SCOPELY, INC., a Delaware  
Corporation, MASSIMO MAIETTI, an  
individual, and EHUD BARLACH, an  
individual,

Defendants.

Case No.

**NOTICE OF MOTION AND  
APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT**

**NOTICE OF MOTION**

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on \_\_\_\_\_, 2016, at \_\_\_\_\_ a.m./pm. or as soon as the matter may be heard, in Courtroom \_\_\_\_ of the Honorable \_\_\_\_\_ at the United States District Court for the Northern District of California, \_\_\_\_\_th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Zynga Inc. (“Zynga”) hereby applies to this Court *ex parte* for a Temporary Restraining Order enjoining defendants Scopely, Inc. (“Scopely”) and Massimo Maietti (“Maietti”) from any further use or disclosure of Zynga’s confidential information or trade secrets, including but not limited to any information taken by former Zynga employees, and specifically including but not limited to any information contained in the nine zip file archives that Maietti copied onto any external USB device prior to his departure from Zynga. Zynga seeks a corresponding order to show cause why Scopely and Maietti should not be similarly restrained in a preliminary injunction pending trial, and further seeks an order to show cause regarding a preliminary injunction enjoining: (1) Maietti and defendant Ehud Barlach (“Barlach”) from, directly or indirectly, soliciting, recruiting, encouraging or inducing any Zynga employee to terminate his or her employment with Zynga; and (2) Scopely from encouraging, causing or permitting Maietti, Barlach, or any other current or former Zynga employee from violating any contractual obligation such person owes to Zynga not to, directly or indirectly, solicit, recruit, encourage or induce any Zynga employee to terminate his or her employment with Zynga.

Zynga makes this Application on the grounds that Scopely’s and Maietti’s misappropriation of trade secrets threatens Zynga with great and irreparable harm. Immediately before resigning his employment with Zynga and joining Scopely, Maietti secretly copied a wealth of valuable, confidential Zynga information—despite the fact that he certified in writing at the time of his termination that he had

1 returned all such information. Money damages will be inadequate to remedy the  
2 harm caused to Zynga if Scopely—a competitor of Zynga—is able to use that  
3 information for its own benefit. Zynga further makes this Application on the  
4 grounds that Maeitti’s and Barlach’s violations of their Employment Invention  
5 Assignment and Confidentiality Agreements and Termination Certifications, and  
6 Scopely’s inducements of such violations, would also cause Zynga irreparable  
7 harm. Zynga seeks an order to show cause why such violations should not be  
8 enjoined in light of Scopely’s written communication to Barlach regarding the  
9 identification of Zynga employees to solicit, in which Scopely stated: “LOL I  
10 would be happy to hear about anyone you think I should be trying to speak with.  
11 Obviously I know you have the clause about not taking people so I am always  
12 careful ☺”

13 This Application is based on this Notice, the accompanying Memorandum of  
14 Points and Authorities, the Application for Temporary Restraining Order and Order  
15 to Show Cause re: Preliminary Injunction and supporting Memorandum of Points  
16 and Authorities, the accompanying Declarations of Tracy Esposito, Pete Hawley,  
17 Scott Koenigsberg, Melanie Maugeri, and Josh Park, the records on file with this  
18 Court, and such other and further showing as may be made before the Court.

19  
20 Dated: November 29, 2016

O’MELVENY & MYERS LLP

21 By: /s/ Eric Amdursky  
22 Eric Amdursky  
23 Attorneys for Plaintiff Zynga, Inc.  
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## I. INTRODUCTION

Plaintiff Zynga Inc. (“Zynga”) seeks an immediate temporary restraining order to prevent defendant Scopely, Inc. (“Scopely”) from misusing critical trade secrets stolen from Zynga by one and likely more former Zynga employees now working for Scopely.

Zynga makes ubiquitous social games like smartphone favorite *Words with Friends* and Facebook staple *Farmville*. Zynga’s social games are serious business, having generated *billions of dollars* in revenues over the last decade. Defendant Massimo Maietti (“Maietti”) was employed by Zynga as its Creative Director. Maietti was responsible for the overarching design of Zynga games, including a high-stakes, soon-to-be-released game.

When Maietti resigned to go to work for Scopely, his boss reminded him of his contractual obligation not to take any files with him. Maietti assured Zynga he would not take anything. But Zynga recently learned that Maietti left with nine “zip” files containing digital libraries of highly-confidential and highly-valuable design and marketing information regarding Zynga’s games—everything that a game designer like Maietti would need to design imitation games for Scopely.

Maietti’s theft came to light after four key Zynga employees joined Scopely in four months—one of whom deleted more than 24,000 files from his computer after conducting Internet searches on how to erase a hard drive. Significantly, after each resignation, Scopely made targeted solicitations of employees in closely-related positions, which suggested potential violations of the employees’ non-solicitation agreements. Forensic examination confirmed that suspicion. While still an employee of Zynga and almost two weeks before giving notice of his departure, Defendant Ehud Barlach (“Barlach”) offered to provide consultation to Scopely in its efforts to solicit other Zynga employees. In a response that revealed Scopely’s *modus operandi* when onboarding a Zynga employee, the Scopely recruiter stated: “Thanks!! I was saving that for your first day! LOL I would be



1 happy to hear about anyone you think I should be trying to speak with. Obviously I  
2 know you have the clause about not taking people so I am always careful ☺”  
3 Careful to avoid getting get caught, but not to act lawfully.

4 Zynga seeks an immediate temporary restraining order preventing  
5 Defendants from using the Zynga trade secrets that at least one (and likely more)  
6 former employee wrongfully took with them to Scopely. This is modest relief  
7 sought to prevent irreparable harm from the use or disclosure of Zynga’s trade  
8 secrets.

9 Although Zynga does not seek to enforce its non-solicitation provisions on an  
10 *ex parte* basis, Zynga does request expedited discovery and an order to show cause  
11 why Defendants should not be restrained from violating those provisions pending  
12 trial. Scopely’s approval of Barlach’s offer to assist in the targeting of Zynga  
13 employees notwithstanding its knowledge of his contrary obligations is highly  
14 troubling. But to avoid any potential delay in obtaining a TRO to protect its trade  
15 secrets, Zynga is willing to defer a ruling on the breaches of the non-solicitation  
16 agreements until after Defendants have had an opportunity to respond.

## 17 **II. STATEMENT OF FACTS**

### 18 **A. Background Regarding The Parties’ Social Gaming Businesses**

19 Since 2007, Zynga rapidly became one of the world’s leading social gaming  
20 companies and a top developer of game applications for mobile devices and social  
21 networking sites. (Koenigsberg Decl. ¶ 3.) It is publicly traded on the Nasdaq  
22 stock exchange and has a market capitalization of approximately \$2.5 billion. (*Id.*)  
23 Sixty million people in the world play Zynga’s games each month. (*Id.*)

24 Some of Zynga’s most popular games include its *with Friends* series,  
25 including its 2009 smash hit *Words with Friends*, as well as *Chess with Friends*,  
26 *Gems with Friends*, *Hanging with Friends*, and *Matching with Friends*. (*Id.* ¶ 4.)  
27 Zynga is also known for its *Ville* series, including *FarmVille* (also launched in  
28 2009) and its wildly popular sequels including *FarmVille 2* (launched in 2012) and

1 *FarmVille 2: Country Escape!* (2014), as well as *CastleVille*, *CityVille*,  
 2 *FrontierVille*, and *PetVille*. (*Id.* ¶ 5.) Zynga has also invested heavily in its  
 3 successful casino-themed social games, including *Hit It Rich! Slots* (2013), *Wizard*  
 4 *of Oz Slots* (2014), and *Willy Wonka Slots* (2016). Similarly, Zynga's crime-  
 5 themed games include *Mafia Wars* (launched in 2009), and *Mafia Wars 2* (2011).  
 6 (*Id.* ¶ 6.)

7 Success breeds copycats. Scopely was founded in 2011, at a time when  
 8 Zynga's nine-figure revenues had already made clear how big the social and mobile  
 9 gaming industry would be. (*Id.* ¶ 8.) Scopely sought to emulate Zynga's success  
 10 by copying its business as closely as possible. In answer to Zynga's *with Friends*  
 11 series, Scopely created a *with Buddies* series, including *Dice with Buddies*, *Jewels*  
 12 *with Buddies*, and *Yahtzee with Buddies*. (*Id.*)

13 It has been apparent for years that Scopely's business has been built on  
 14 copying Zynga's. But Zynga has just learned that Scopely's copying may not be  
 15 limited to Zynga's concepts, but extends to unlawful copying of Zynga's trade  
 16 secret information. Accordingly, Zynga brings this application for a TRO.

#### 17 **B. Maietti's Taking Of Zynga Trade Secrets To Scopely**

18 Maietti worked for Zynga between January 2011 and July 2016, when he  
 19 resigned to go to Scopely—taking with him copies of nine “zip” file archives  
 20 containing over 14,000 digital documents full of Zynga trade secret design and  
 21 marketing information. (Esposito Decl. ¶¶ 6, 14; Maugeri Decl. ¶¶ 11-16.)

22 Between 2012 and 2015, Maietti was the Lead Designer and Director of  
 23 Design on *Farmville 2*. (Koenigsberg Decl. ¶ 10.) Maietti was responsible for  
 24 designing new features and content, including tuning the feature economy and  
 25 system for optimization, to be released in the game. (*Id.*) Zynga's *Farmville*  
 26 franchise has been highly successful, generating over a billion dollars in revenues.  
 27 (*Id.* ¶ 5.) Maietti made significant contributions to that success by leading the  
 28 release of quarterly upgrades and new features that attracted and retained

1 customers. (*Id.* ¶10.)

2 From the Spring of 2015 to his departure, Maietti was the Creative Director  
3 for an unreleased game, still in development at Zynga, code-named “Project Mars.”  
4 (Hawley Decl. ¶ 5.) On Project Mars, Maietti was primarily responsible for the  
5 creative direction of the game, as well as supervising and managing the entire  
6 design team. (*Id.*) Zynga has put substantial resources into the development of  
7 Project Mars, which is an ambitious project with complex gameplay interactions  
8 and systems built upon revolutionary technology developed over the past 18  
9 months by a team of engineers, artists, and product managers. (*Id.* ¶ 3.) Zynga  
10 believes it will bring social gaming to another level. (*Id.*)

11 Having occupied top-level, strategic positions overseeing game design on  
12 two of Zynga’s most important franchises, Maietti was necessarily privy to some of  
13 Zynga’s most valuable trade secrets regarding its game design and marketing. (*Id.*  
14 ¶ 5.) And Zynga acted accordingly. In addition to significant physical and  
15 technological security measures designed to protect that information from outsiders,  
16 Zynga entered into agreements with its employees—including Maietti—to protect  
17 the information from misuse or disclosure by insiders. (Esposito Decl. ¶¶ 4, 7,  
18 20(a-h).)

19 In his Employment Invention Assignment and Confidentiality Agreement  
20 (“EIACA”), Maietti acknowledged that he occupied a position of “confidence and  
21 trust with respect to any information of a confidential or secret nature,” and he  
22 agreed that he would not improperly “use, disclose, copy, reverse-engineer,  
23 distribute, gain unauthorized access or misappropriate” any of Zynga’s trade secrets  
24 at any time, either during his employment or after its termination. (*Id.* ¶ 8, Exh. B  
25 at § 7.) Maietti expressly agreed that upon the termination of his employment, he  
26 would “promptly deliver to the Company all documents and materials of any nature  
27 or form, in [his] possession, custody or control, pertaining to [his] work with the  
28 Company and, upon Company request, will execute a document confirming [his]

1 agreement to honor [his] responsibilities contained in this Agreement.” (*Id.* ¶ 9,  
2 Exh. B at § 9.)

3 When Maietti gave notice of his resignation to Pete Hawley, his supervisor,  
4 Hawley’s first thought was the protection of Zynga’s trade secrets. Hawley  
5 verbally reminded Maietti not to take any information or documents with him.  
6 (Hawley Decl. ¶ 7.) Hawley also accelerated Maietti’s last day of employment to  
7 cut off his continued access to trade secrets. (*Id.* ¶ 8.) And, consistent with  
8 Maietti’s promise in the EIACA, Zynga requested that Maietti confirm in writing  
9 that he had returned all of Zynga’s trade secrets. (Esposito Decl. ¶ 15.) Maietti  
10 signed a Termination Certification in which he confirmed he had done so. (*Id.*,  
11 Exh. C.) But Zynga has just learned that Maietti’s certification was a lie.

12 In fact, just one day before he gave notice of his resignation, Maietti  
13 connected an external USB device to his Zynga laptop and copied nine “zip” files  
14 containing archives of Zynga’s trade secrets, as follows:

15 • “Project\_Mars-2016-07-04.zip” is an archive of approximately 12,200 files  
16 relating to Zynga’s unreleased game code-named, “Project Mars.” These files  
17 include user concepts, theme testing, art exploration, core design, feedback surveys,  
18 financial projections, “go-to-market” plans, engineering information, and word and  
19 language choices for the game. The files include (a) “MW Greenlight,” a  
20 confidential 68-page presentation used to obtain multi-million dollar funding and  
21 approval for the game, which represents the culmination of two months of work; (b)  
22 a Remote Longitudinal November 2015 Final Report” representing surveys of  
23 gamers; and (c) “Issues to discuss with Jon Levin,” a specific list of questions for  
24 the Dean of the Stanford Graduate School of Business whom Zynga hired to assess  
25 economically-complex aspects of the game and strategies for monetization.  
26 (Hawley Decl. ¶¶ 10-13; Maugeri Decl. ¶ 13(a).)

27 • “FV2-2016-07-04.zip” is an archive of approximately 480 files relating to  
28 *FarmVille 2*, including detailed design specifications used by the design,

1 engineering, art, and products teams to create new, revenue generating features for  
 2 the game. (Koenigsberg Decl. ¶ 17; Maugeri Decl. ¶ 13(b).) Notably, the files  
 3 include “Full Spec - My Farm Co-Op,” which is a complete specification in the  
 4 form of a 172-slide PowerPoint presentation for one of the most successful features  
 5 in *FarmVille 2*. (Koenigsberg Decl. ¶ 17.)

6 • “Farm\_2\_-\_LE\_and\_Feature\_Content-2016-07-04.zip” is an archive of  
 7 approximately 800 additional files relating to *FarmVille 2*, including “cadence”  
 8 content, or features that Zynga released in prior games. (Koenigsberg Decl. ¶ 18;  
 9 Maugeri Decl. ¶ 13(c).) Having this information compiled in one location would  
 10 save a company significant time and money if it were to create a farm simulation  
 11 game. (Koenigsberg Decl. ¶ 18.)

12 • “FtV2-2016-07-04.zip” is an archive of approximately 55 files relating to  
 13 *FrontierVille 2*, an unreleased game, including production specifications and  
 14 documents related to creative direction, narrative, and game fiction. (Koenigsberg  
 15 Decl. ¶ 19; Maugeri Decl. ¶ 13(d).) Included among other files is the spreadsheet  
 16 “FTV2 UI-UX Best Practices” that analyzes industry practices for user interfaces  
 17 for similar games compared to Zynga’s best practices. (Koenigsberg Decl. ¶ 19.)

18 • “CastleVille\_Documentation-2016-07-04.zip” is an archive of approximately  
 19 750 files relating to *CastleVille*, including sales targets and revenue goals, feature  
 20 ideas, and design resources. (Koenigsberg Decl. ¶ 20; Maugeri Decl. ¶ 13(e).)  
 21 Among other things, the files include a spreadsheet titled, “What Monetizes Well -  
 22 Recipes - Ingredients - Buildable Parts - 2013 01 18,” which provides data and  
 23 analysis regarding the relative success of different features to generate revenue.  
 24 (Koenigsberg Decl. ¶ 20.)

25 • “CastleVille-2016-07-04.zip” is an archive of approximately four additional  
 26 files relating to *CastleVille*, including files relating to feature concepts to increase  
 27 user engagement and growth. (Koenigsberg Decl. ¶ 21; Maugeri Decl. ¶ 13(f).)

28 • “ArcadeVille-2016-07-04.zip” contains one file relating to *ArcadeVille*,

1 which summarizes the essential elements of an unreleased game concept, including  
 2 social features, game world, avatar system, metrics, monetization, and animated  
 3 photos of the game. (Koenigsberg Decl. ¶ 22; Maugeri Decl. ¶ 13(g).)

4 • “Z-Platform-2016-07-04.zip” is an archive of approximately seven files  
 5 relating to an unreleased concept for Zynga.com, which includes statistical data  
 6 related to games used to organize and classify player behavior and activity.  
 7 (Koenigsberg Decl. ¶ 23; Maugeri Decl. ¶ 13(h).) Among other things, the files  
 8 include “Token Economy Model,” which uses data collection to maximize revenue  
 9 generation. (Koenigsberg Decl. ¶ 23.)

10 • “SDP’s-2016-07-04.zip” is an archive of approximately 100 files relating to  
 11 employee mentoring, skill development, and career development. (Koenigsberg  
 12 Decl. ¶ 24; Maugeri Decl. ¶ 13(i).) Among other things, the files include “Feature  
 13 Development Timeline,” a 37-page PowerPoint presentation for improving the  
 14 quality of features, reducing late stage changes in features, and providing more  
 15 accurate cost assessments. (Koenigsberg Decl. ¶ 24.)

16 In his EIACA, Maietti also agreed not to directly or indirectly solicit Zynga  
 17 employees for a year following his termination. In his Termination Certification  
 18 signed July 12, 2016, Maietti further agreed that for one year, he would “not  
 19 directly or indirectly, solicit, induce, recruit or encourage any of the Company’s  
 20 employees to leave their employment.” (Esposito Decl. ¶ 23; Exh. C.) Maietti  
 21 remained on Zynga’s payroll through July 21, 2016. Yet the very next day after  
 22 Maietti signed his Termination Certification, while Zynga was still paying him,  
 23 Scopely solicited Zynga’s Lead Product Manager, Joshua Park, who worked closely  
 24 with Maietti, telling Park that Scopely had heard favorable feedback about him.  
 25 (Park Decl. ¶ 6.) When Park attended his interviews with Scopely, his first  
 26 interview was with Maietti, who encouraged Park to leave Zynga. (*Id.* ¶ 9.)

### 27 **C. Barlach’s Offer To Help Scopely Solicit Zynga Employees.**

28 Barlach was hired by Zynga in 2013 and served as General Manager of *Hit It*



1 *Rich! Slots* (“*Hit it Rich!*”). (Koenigsberg Decl. ¶ 13.) Like Maietti, Barlach  
 2 occupied top-level positions for the games on which he worked. (*Id.*) And like  
 3 Maietti, Barlach signed an EIACA and Termination Certification in which he  
 4 agreed not to misuse or disclose Zynga’s trade secrets and in which he agreed not to  
 5 directly or indirectly solicit Zynga’s employees. (Esposito Decl. ¶ 17, Exhs. D, E.)

6 Like Maietti, Barlach appears to have accessed Zynga trade secrets in  
 7 anticipation of his resignation. On August 8, 2016, after Scopely offered him  
 8 employment, Barlach accessed files and folders stored on Dropbox named “SIR +  
 9 HIR Export Strategy\_July 2016.pdf,” “HIR, SIR, TV Benchmark Report\_July  
 10 2016.pdf,” and “Zynga”. (Maugeri Decl. ¶ 24.) As late as August 22, 2016,  
 11 Barlach attached an external USB device to his Zynga-issued computer. (*Id.* ¶ 23.)  
 12 Forensic analysis suggests that Barlach may have copied a folder titled “Hit It  
 13 Rich!” to that drive, though details are limited at this time. (*Id.*)

14 Forensic analysis is even stronger that Barlach improperly solicited Zynga  
 15 employees. On August 10, 2016, while still employed by Zynga, Barlach sent an  
 16 iMessage to Christina Dunbar (“Dunbar”), Scopely’s Talent Strategy Partner,  
 17 offering to consult with her regarding other Zynga employees that Scopely was  
 18 considering to target for employment at Scopely. (*Id.* ¶ 26.) Dunbar responded:  
 19 “Thanks!! I was saving that for your first day! LOL I would be happy to hear about  
 20 anyone you think I should be trying to speak with. Obviously I know you have the  
 21 clause about not taking people so I am always careful ☺” (*Id.*)

22 Shortly thereafter, Scopely solicited four other key players in Zynga’s Slots  
 23 group: Chuck Hess, Chief Technology Officer, Slots; Matthew Copeland,  
 24 Divisional Executive Producer, Slots; Derek Heck (“Heck”), Product Manager on  
 25 *Wizard of Oz Slots* and *Willy Wonka Slots*; and Evan Hou (“Hou”), a Manager, Data  
 26 Analytics who was embedded with the *Hit it Rich!* group. (Koenigsberg Decl.  
 27 ¶¶ 14-15, 26.) Indeed, Hou was solicited by Scopely no later than September 6,  
 28 2016, just four days after Barlach’s last day. (Maugeri Decl. ¶ 40.) Both Heck and

1 Hou attached external USB devices to their Zynga-issued laptops less than a week  
2 before resigning. (*Id.* ¶¶ 30, 37.)

3 Significantly, Heck deleted more than 24,000 files and folders from his  
4 Zynga-issued computer before he resigned from Zynga. (*Id.* ¶ 31.) Heck visited  
5 websites titled “How to erase to my hard drive and start over” and “How to Erase a  
6 Computer Hard Drive – How To Articles,” before deleting 24,000 files, his Internet  
7 browser history, Internet download folder, and Trash. (*Id.* ¶¶ 31, 32.)

8 Thus, there are at least four former Zynga employees now working for  
9 Scopely who may have taken Zynga trade secrets. And that is just what Zynga  
10 knows now, before conducting discovery.

### 11 **III. ARGUMENT**

12 “To obtain a preliminary injunction, a plaintiff must demonstrate that: (1) it  
13 ‘is likely to succeed on the merits’; (2) it ‘is likely to suffer irreparable harm in the  
14 absence of preliminary relief’; (3) ‘the balance of equities tips in [its] favor’; and  
15 (4) ‘an injunction is in the public interest.’” *Boardman v. Pac. Seafood Grp.*, 822  
16 F.3d 1101, 1120 (9th Cir. 2016) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 55  
17 U.S. 7, 20 (2008)). “‘Serious questions going to the merits and hardship balance  
18 that tips sharply towards [plaintiffs] can [also] support issuance of a[] [preliminary]  
19 injunction, so long as there is a likelihood of irreparable injury and the injunction is  
20 in the public interest.’” *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081  
21 (9th Cir. 2015) (citation and internal quotation marks omitted).

#### 22 **A. Defendants Should Be Restrained Under The DTSA From Using** 23 **Or Disclosing Zynga’s Trade Secrets.**

24 It is well-settled that employees cannot copy their employers’ trade secrets  
25 and take them to new employers. Yet that is precisely what Maietti did:  
26 immediately before resigning, Maietti copied electronic libraries of data files about  
27 Zynga’s games to a portable drive that he could take with him when he went to  
28 work for Scopely. To prevent Defendants from reaping the benefits of



misappropriating Zynga's trade secrets, Zynga seeks an immediate but *limited* TRO restraining Defendants from using or disclosing its trade secrets.

### **1. The DTSA Creates Subject Matter Jurisdiction.**

The DTSA was passed with overwhelming bipartisan support (410 to 2 in the House of Representatives and 87 to 0 in the Senate) and was signed into law by President Obama on May 11, 2016. Its provisions apply to any conduct occurring after that date, including the conduct at issue in this action. 18 U.S.C. § 1833, Act May 11, 2016, P.L. 114-153, § 2(d), 130 Stat. 381.

The DTSA creates a new federal civil remedy for misappropriation of trade secrets and confers federal subject matter jurisdiction over such claims. 18 U.S.C. § 1836 ("An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."). Zynga's trade secrets satisfy that standard. Its games are sold throughout the United States and the world. (Koenigsberg Decl. ¶ 7.) The design and marketing information that Maietti took relates to social games that are sold in interstate and foreign commerce. (*Id.* ¶ 25.)

The first case seeking interim injunctive relief under the DTSA in this District was filed within a month of the DTSA's passage. *See Henry Schein, Inc. v. Cook*, 2016 U.S. Dist. LEXIS 76038, at \*15 (N.D. Cal. June 6, 2016) (granting application for TRO under the DTSA and ordering that "Defendant, and all those acting in concert or participation with her, are hereby enjoined from directly or indirectly accessing, using, disclosing, or making available to any person or other entity other than Plaintiff, any of HIS's confidential, proprietary, or trade secret documents, data or information."); 2016 U.S. Dist. LEXIS 81369, at \*32 (N.D. Cal. June 22, 2016) (granting preliminary injunction including same prohibition).

### **2. Overview Of Claims Under The DTSA.**

The DTSA prohibits "misappropriation" of a trade secret. Misappropriation includes "acquisition of a trade secret of another by a person who knows or has

reason to know that the trade secret was acquired by improper means.” 18 U.S.C. § 1839(5)(A). Misappropriation also includes:

disclosure or use of a trade secret of another without express or implied consent by a person who—(i) used improper means to acquire knowledge of the trade secret; [or] (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was . . . (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret.

18 U.S.C. § 1839(5)(B). “Improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” 18 U.S.C. § 1839(6).

18 U.S.C. § 1839(3) defines the term “trade secret” to mean:

all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

The DTSA’s definitions mirror those contained in the Uniform Trade Secrets Act (“UTSA”), versions of which exist in the majority of states, including California. Accordingly, while the DTSA is an entirely new federal statute, the Court can borrow from decisions interpreting the UTSA, at least to the extent that the statutes are not in conflict. *See Adams Arms, LLC v. Unified Weapon Sys., Inc.*, 2016 U.S. Dist. LEXIS 132201, at \*14 (M.D. Fla. Sept. 27, 2016) (“The DTSA includes definitions, remedies, and a statute of limitations substantially similar to provisions in the Uniform Trade Secrets Act.”).

### **3. Zynga Is Sufficiently Likely To Prevail On Its Trade Secret Claim To Support An Injunction Against Misappropriation.**

#### **a. Zynga Is Entitled To Trade Secret Protection.**

Zynga’s design and marketing information regarding its games easily satisfies the requirement of deriving “independent economic value, actual or

1 potential, from not being generally known.” 18 U.S.C. § 1839(3).

2 In *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992),  
 3 the Ninth Circuit held that analogous software development and testing information  
 4 was entitled to strong trade secret protection. In that case, Symantec produced such  
 5 information pursuant to a protective order that prevented disclosure to Brown Bag’s  
 6 in-house counsel. Brown Bag argued its in-house counsel needed access to the  
 7 information to participate in the litigation in a meaningful way. The Ninth Circuit  
 8 disagreed and upheld the protective order. As relevant here, even though it sought  
 9 access to the information, even Brown Bag admitted that the information  
 10 constituted a trade secret: “The parties agree that source codes, development plans,  
 11 and beta tester information . . . constitute protectable trade secrets.” *Id.* at 1470.

12 The result must be the same here. On July 4, 2016, just one day before he  
 13 gave notice of his resignation from Zynga, Maietti connected an external USB  
 14 device to his Zynga laptop and copied nine “zip” files containing repositories of  
 15 Zynga files relating to many of its most important games—including an upcoming,  
 16 unreleased game code-named “Project Mars,” which Maietti was working on at the  
 17 time of his resignation, and also including substantial information regarding other  
 18 Zynga games including *FarmVille*, *FarmVille 2*, and *CastleVille*. (Maugeri Decl.  
 19 ¶¶ 11-16; Koenigsberg Decl. ¶¶ 16-24.) This information is not accessible to the  
 20 public and is not generally known. (Koenigsberg Decl. ¶¶ 16-24; Hawley Decl.  
 21 ¶ 14.) It is, however, incredibly valuable to Zynga, and it would have significant  
 22 value to any competitor of Zynga (like Scopely) that wanted to create and market  
 23 competing games without doing all of the necessary work to do so on its own.  
 24 (Koenigsberg Decl. ¶¶ 16-24; Hawley Decl. ¶ 14.)

25 While the type of information that can qualify for trade secret protection is  
 26 broad, courts have held that a hallmark of trade secret information is the cost of  
 27 creating it. *See, e.g., Courtesy Tem. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278,  
 28 1288 (1990) (“Here, the evidence established that Courtesy’s customer list and

1 related information was the product of a substantial amount of time, expense and  
 2 effort on the part of Courtesy.”); *ReadyLink Healthcare v. Cotton*, 126 Cal. App.  
 3 4th 1006, 1020 (2005) (“there is substantial evidence establishing that ReadyLink’s  
 4 lists of hospitals and nurses, as well as other proprietary and confidential  
 5 information listed in the preliminary injunction, were procured by substantial time,  
 6 effort, and expense.”). That is the case here.

7 “Project Mars” has been under development at Zynga for approximately a  
 8 year and a half. (Hawley Decl. ¶ 3.) The team working on it includes  
 9 approximately fifty employees. (*Id.*) In addition to significant labor costs, Zynga  
 10 has incurred other substantial expenses related to the game’s development,  
 11 including retaining a Professor of Economics from Stanford University to assist  
 12 with the development of the in-game economy and spending approximately  
 13 \$68,000 to hire an outside consultant to conduct a survey of potential customers to  
 14 determine what features to include. (*Id.* ¶¶ 12, 13.) The information taken by  
 15 Maietti contains detailed information regarding the design and marketing of  
 16 Zynga’s games, including the culmination of the work of the entire team working  
 17 on the game, which was created at significant expense. (*Id.* ¶ 3.) This information  
 18 would have significant value to a competitor interested in creating competing  
 19 games without having to do all the necessary work on its own. (*Id.* ¶ 14.) It easily  
 20 qualifies as “valuable” information that is protectable as a trade secret.

21 **b. Zynga Acts Reasonably To Protect Its Trade Secrets.**

22 Zynga takes reasonable steps to ensure the secrecy of its trade secret  
 23 information by restricting access to its premises, limiting access to information  
 24 within the company, password protecting information on its computers, providing  
 25 training on confidentiality obligations, and requiring employees to sign  
 26 confidentiality agreements. (Esposito Decl. ¶¶ 20(a-h).) Such steps entitle Zynga’s  
 27 confidential information to be afforded trade secret protection. *See MAI Sys. Corp.*  
 28 *v. Peak Comput., Inc.*, 991 F.2d 511, 521 (9th Cir. 1993) (“MAI took reasonable

1 steps to insure the secrecy to this information as required by the UTSA. MAI  
 2 required its employees to sign confidentiality agreements respecting its trade  
 3 secrets, including the Customer Database. Thus, under the UTSA, the MAI  
 4 Customer Database constitutes a trade secret.”); *K-2 Ski Co. v. Head Ski Co., Inc.*,  
 5 506 F.2d 471, 474 (9th Cir. 1974); *see also Whyte v. Schlage Lock Co.*, 101 Cal.  
 6 App. 4th 1443, 1454 (2002) (“Requiring employees to sign confidentiality  
 7 agreements is a reasonable step to ensure secrecy.”); *Morlife, Inc. v. Perry*, 56 Cal.  
 8 App. 4th 1514, 1523 (1997) (storing trade secrets “on computer with restricted  
 9 access” and using a “confidentiality provision” were “reasonable steps . . . to  
 10 protect the information from disclosures.”).

11 Zynga’s entry into agreements to protect its trade secrets is not only a  
 12 generally applicable practice, but was uniformly followed with the individuals at  
 13 issue here. In his EIACA, Maietti agreed: “At all times, both during my  
 14 employment and after its termination, I will keep and hold all such Proprietary  
 15 Information in strict confidence and trust. I will not use, disclose, copy, reverse-  
 16 engineer, distribute, gain unauthorized access or misappropriate any Proprietary  
 17 Information . . . .” (Esposito Decl. ¶ 8, Exh. B at § 9.) Barlach, Heck, and Hou  
 18 made the same promises in their EIACAs. (*Id.* ¶¶ 17-19, Exhs. D, F, and H.)

19 When Maietti resigned, his supervisor immediately took additional steps to  
 20 protect Zynga’s trade secrets. Hawley verbally reminded Maietti not to take any  
 21 Zynga files or documents with him to Scopely. (Hawley Decl. ¶ 7.) To cut off  
 22 Maietti’s continued access to Zynga’s trade secrets, Hawley also requested that  
 23 Zynga’s human resources make Maietti’s resignation effective immediately, even  
 24 though Maietti had given a standard two-weeks’ notice. (*Id.* ¶ 8.)

25 In accordance with Maietti’s earlier agreement in his EIACA, Zynga also  
 26 requested Maietti to sign a Termination Certification, which Maietti did on July 12,  
 27 2016. In his Termination Certification, Maietti again agreed “that, in compliance  
 28 with the [EIACA], I will preserve as confidential all trade secrets, confidential

1 knowledge, data or other proprietary information . . .” (Esposito Decl. ¶ 15, Exh.  
 2 C.) Barlach, Heck, and Hou also signed an EIACA and Termination Certification  
 3 containing identical promises. (*Id.* ¶¶ 17-19, Exhs. D-I.)

4 Because Zynga engages in reasonable efforts to maintain the confidentiality  
 5 of its trade secrets, Zynga is entitled to protection under the DTSA.

6 **c. Defendants Should Be Enjoined From**  
 7 **Misappropriating Zynga’s Trade Secrets.**

8 Under the DTSA, the Court may grant an injunction “to prevent any actual or  
 9 threatened misappropriation” of trade secrets. 18 U.S.C. § 1836(3); *JustMed, Inc.*  
 10 *v. Bryce*, 600 F.3d 1118, 1131 (9th Cir. 2010) (holding in a case where the defendant  
 11 possessed but did not use the plaintiff’s computer files, “the district court may issue  
 12 an injunction against [the defendant’s] threatened use or disclosure”). Zynga  
 13 concurrently seeks expedited discovery to confirm whether Defendants have  
 14 actually used its trade secrets—something that is inherently difficult for a plaintiff  
 15 to prove before discovery takes place. At a minimum, however, there is sufficient  
 16 evidence of Defendants’ misconduct to justify injunctive relief: Maietti’s actions in  
 17 copying Zynga’s trade secrets in violation of his EIACA to a portable storage  
 18 device immediately before his resignation, his false certification that he had  
 19 returned Zynga’s trade secrets when in fact he did not, and his secretly taking those  
 20 trade secrets when he started employment with Scopely.

21 In *Fitspot Ventures, LLC v. Bier*, 2015 U.S. Dist. LEXIS 116579 (C.D. Cal.  
 22 Sept. 1, 2015), the court issued a TRO to prevent use or disclosure of trade secrets  
 23 in similar circumstances. In that case, the plaintiff-company requested the return of  
 24 its files from the defendant-former employee. The defendant in that case kept a  
 25 copy of those files. The court granted a TRO: “Plaintiff has provided evidence that  
 26 Defendant has acted outside the scope of the Confidentiality agreement by . . .  
 27 maintaining a hard drive with information that was suppose [sic] to be turned over  
 28 to Plaintiff.” *Id.* at \*9. “Furthermore, Plaintiff alleges that Defendant is now



1 working for another tech company, Honk.com, that may benefit.” *Id.* “Therefore,  
2 the Court finds that Plaintiff will likely succeed in establishing that its customer  
3 information and source code qualify as trade secrets and that Defendant’s conduct  
4 amounts to ‘actual or threatened’ misappropriation.” *Id.* at \*8-10.

5 Similarly here, there is substantial evidence that Maietti acted in violation of  
6 his repeated agreements to return Zynga’s trade secrets to it at the conclusion of his  
7 employment. In his EIACA, Maietti agreed: “Upon termination of my  
8 employment with the Company, I will promptly deliver to the Company all  
9 documents and materials of any nature or form, in my possession, custody or  
10 control, pertaining to my work with the Company and, upon Company request, will  
11 execute a document confirming my agreement to honor my responsibilities  
12 contained in this Agreement. I will not take with me or retain any documents or  
13 materials or copies thereof containing any Proprietary Information.” (Esposito  
14 Decl. ¶ 9, Exh. B at § 9.) In fact, Zynga did request that Maietti provide the written  
15 confirmation described in his EIACA, which Maietti signed on July 12, 2016.  
16 Maietti’s Termination Certification states: “This is to certify that I do not have in  
17 my possession, nor have I failed to return, any devices, records, data, notes, reports,  
18 proposals, lists, correspondence, specifications, drawings, blueprints, sketches,  
19 materials, equipment, other documents or property, or reproductions of any  
20 aforementioned items belonging to Zynga.” (Esposito Decl. ¶ 15, Exh. C.)

21 Despite Maietti’s assurances that he had returned all of Zynga’s trade secrets,  
22 a forensic examination of Maietti’s computer usage discloses that, the day before  
23 resigning, Maietti copied nine “zip” files—each containing large numbers of digital  
24 files including design and marketing information relating to several Zynga games—  
25 to an external storage device. (Maugeri Decl. ¶¶ 11-16; Koenigsberg ¶¶ 16-24.)  
26 Maietti knew at that time that he would be going to work for a competitor of  
27 Zynga—defendant Scopely—where that information would be a valuable resource.  
28 (Hawley Decl. ¶ 14.) Did Maietti actually use that information on behalf of

Scopely? Discovery will tell. But as the Court found in *Fitspot Ventures*, an injunction against such use should issue when an employee copies his employer’s electronic information, refuses to return it to the employer, and instead takes it to a competitor who could exploit it.

#### 4. Zynga Faces Irreparable Harm Absent An Injunction.

The courts have routinely recognized that a competitor’s misuse of a company’s trade secrets constitutes irreparable harm. *See, e.g., Nike, Inc. v. McCarthy*, 379 F.3d 576, 587 (9th Cir. 2004) (“Nike has shown potential harm from unfair competition due to McCarthy’s knowledge of confidential information peculiar to Nike’s products”); *PHP Healthcare Corp. v. EMSA Ltd. P’ship*, 14 F.3d 941, 945-46 (4th Cir. 1993) (noting that irreparable harm is “presumed where trade secrets or customer lists are used or existing customers solicited.”); *North Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (“loss of trade secrets cannot be measured in money damages because [a] trade secret once lost is, of course, lost forever.”) (citations and internal quotation marks omitted). Misuse of Zynga’s trade secrets would cause irreparable harm.

First, if Defendants incorporate Zynga’s trade secrets into a Scopely game, it will be difficult to precisely calculate monetary damages. Zynga makes small sales to millions of customers. (Koenigsberg Decl. ¶ 27.) Zynga will unfairly lose customers if Scopely releases imitation games that are built on Zynga designs. (*Id.* ¶ 28.) But given the number of customers at issue, it would be a Herculean task to obtain testimony regarding whether they would have continued playing Zynga’s games absent Scopely’s unfair competition. Meanwhile, Scopely will be unjustly enriched by using Zynga’s trade secrets, and its profits from unjust enrichment may also be difficult to reduce to a monetary award. (*Id.* ¶ 27.) Absent timely injunctive relief, Zynga faces a substantial risk of being unable to secure a full remedy for Defendants’ misconduct. (*Id.* ¶¶ 27, 28.)

Second, even if the Court later enjoins Defendants from continuing their



1 unlawful conduct, there is no effective remedy it can order to compel Zynga's  
 2 customers to return to Zynga. If customers stop or reduce their playing Zynga's  
 3 games to play a Scopely game, a substantial number of those customers will not  
 4 return even if the Court later shuts Scopely's game down. (*Id.* ¶ 28.) The Court  
 5 cannot compel those customers to resume patronizing Zynga, even if it can enjoin  
 6 Defendants' unlawful conduct. The damage will be irreparable.

### 7                   **5. The Balance Of The Hardships Heavily Favors Zynga.**

8           In weighing the balance of the hardships, it is important to keep in mind the  
 9 limited and modest nature of the relief that Zynga seeks: a TRO restraining  
 10 Defendants from using Zynga's trade secrets. Zynga does not seek an injunction  
 11 that prevents Maietti from working for Scopely. Zynga does not seek an injunction  
 12 that prevents Scopely from releasing any product it developed on its own. All  
 13 Zynga seeks is an injunction restraining Defendants from using the confidential  
 14 information that former Zynga employees copied in anticipation of joining Scopely.  
 15 On that limited issue, the balance of the hardships tips sharply in Zynga's favor.

16           In what appears to be the only decision in this District to have decided an  
 17 application for a TRO under the DTSA, the Court held in similar circumstances that  
 18 the balance of the hardships favors interim relief. *See Henry Schein, Inc.*, 2016  
 19 U.S. Dist. LEXIS 76038. On the one hand, the trade secret plaintiff will "suffer  
 20 irreparable harm if [defendant] is allowed to continue to try to divert its customers  
 21 using [plaintiff's] own confidential, proprietary, and trade secret documents and  
 22 information." *Id.* at \*9. "By contrast, [defendant] will suffer no undue hardship  
 23 because she would not be prohibited from engaging in activity that is proper." *Id.*  
 24 (quotation marks omitted). "Accordingly, the Court concludes the balance of  
 25 equities tips in favor of granting the TRO." *Id.* at \*10 (citing *Dish Network L.L.C.*  
 26 *v. Ramirez*, 2016 U.S. Dist. LEXIS 72317, at \*7 (N.D. Cal. June 2, 2016) ("balance  
 27 of hardships tips in favor of plaintiff seeking injunction when it would 'do no more  
 28 than require Defendant to comply with federal and state . . . laws'")); *see also*

1 *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms.*  
 2 *Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (“[T]he injury a defendant might suffer if an  
 3 injunction were imposed may be discounted by the fact that the defendant brought  
 4 that injury upon itself.”).

5 This Court should reach the same conclusion here. Defendants cannot suffer  
 6 any legitimate hardship by being restrained from misappropriating Zynga’s trade  
 7 secrets. Having improperly acquired and retained Zynga’s trade secrets,  
 8 Defendants cannot plausibly complain of being restrained from using them.

### 9 **6. The Public Interest Favors Injunctive Relief.**

10 The public interest similarly favors injunctive relief. As the District Court  
 11 explained in *Henry Schein, Inc.*, the “[p]ublic interest is also served by enabling the  
 12 protection of trade secrets.” 2016 U.S. Dist. LEXIS 76038, at \*10 (citing *Bank of*  
 13 *Am., N.A. v. Lee*, 2008 U.S. Dist. LEXIS 110410, at \*7 (C.D. Cal. Sept. 22, 2008)).  
 14 There is no public interest in permitting one company to use another company’s  
 15 trade secrets. *See EF Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485,  
 16 1504 (D. Minn. 1985) (“The defendant argues that the public has an interest in  
 17 competition. The public’s interest, however, is in *fair* competition, and not the  
 18 unlawful and unfair competition engaged in by the defendant.”) (emphasis in  
 19 original). Thus, the public interest weighs in favor of injunctive relief here.

### 20 **7. No Injunction Bond Should Be Required.**

21 Because of the limited nature of the relief sought in this TRO, the Court  
 22 should enjoin Defendants from misappropriating Zynga’s trade secrets without the  
 23 need for any injunction bond. In *Henry Schein, Inc.*, the Court granted a TRO  
 24 under the DTSA and stated: “Plaintiff argues that no bond should be required  
 25 because the TRO will not cause any damage to [defendant’s] legitimate business . .  
 26 . The Court agrees, and concludes no bond is required.” 2016 U.S. Dist. LEXIS  
 27 76038, at \*10. This Court should reach the same conclusion here. Because of the  
 28 modest relief sought in this TRO, no bond should be required.

**B. Defendants Should Be Restrained Under Their Agreements From Using Or Disclosing Zynga's Information.**

In addition to the DTSA's prohibitions on misappropriation of trade secrets, Zynga's EIACAs and Termination Certifications with its former employees, including Maietti and Barlach, provide an independent basis for a TRO. The DTSA does not preempt that remedy. *See* 18 U.S.C. § 1838 ("this chapter shall not be construed to preempt or displace any other remedies").

For the reasons described above, Zynga is also likely to prevail on its claim for breach of contract based on the taking of Zynga's confidential information, Zynga faces irreparable harm, and the balance of the hardships and public interest all favor issuance of a TRO. In their EIACAs, Maietti and Barlach agreed that they would not use or disclose Zynga's confidential information, and that they would return all such materials upon the termination of their employment relationship. (Esposito Decl. ¶¶ 9, 17, Exhs. B at § 9, D at § 9.) They reaffirmed these promises at the time of their resignations in their Termination Certification. (*Id.* ¶¶ 15, 17, Exhs. C, E.) Yet Maietti violated his promise and gave false assurances to Zynga, and left his employment with a USB drive full of Zynga's confidential documents. (Maugeri Decl. ¶¶ 11-16.) Defendants should be enjoined from further breaches of their agreements not to use or disclose Zynga's confidential information.

Significantly, Zynga can establish it is likely to prevail on its contract claims whether or not Defendants' conduct also constitutes misappropriation of trade secrets. *See e.g., Ajaxo Inc. v. E\*Trade Grp, Inc.*, 135 Cal. App. 4th 21, 62 n.38 (2006) ("In some cases, a breach of contract cause of action may be available where disclosed information does not qualify as a 'trade secret' . . . if the information is protected under a confidentiality or nondisclosure agreement."). Thus, even if the Court finds some defect in of Zynga's DTSA claim, the Court should nevertheless issue a TRO to enforce the contracts protecting Zynga's information.

**C. Defendants Should Be Ordered To Show Cause Why They Should Not Be Restrained From Violating Their Agreements Not To Solicit Zynga Employees.**

To minimize the relief sought on an *ex parte* basis, and to allow time for Zynga to seek expedited discovery regarding the issue, Zynga does not ask that the Court issue an *ex parte* TRO enforcing Maietti's and Barlach's agreements not to solicit Zynga employees—but Zynga does ask that the Court issue an order to show cause why a preliminary injunction ordering such relief should not be granted. A preliminary injunction that merely restrains Defendants from misappropriating Zynga's trade secrets, though important, will not fully prevent the injuries that Defendants are causing. Defendants' targeted solicitations of employees who could exploit the information they have taken must also be stopped.

**1. Enough Evidence Exists Of Defendants' Violations Of Their Non-Solicitation Agreements To Warrant Further Inquiry.**

Zynga is likely to prevail on its action for breach of Maietti's and Barlach's non-solicitation agreements and Scopely's inducement of that breach—or, at a minimum there is sufficient circumstantial evidence of such violations to merit immediate discovery and an order to show cause.

“[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for performance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.” *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820-21 (2011). The elements of a cause of action for tortious interference with a contract are (1) an enforceable contract between plaintiff and a third-party; (2) defendant's knowledge of the existence of that contract; (3) defendant's intentional acts or conduct, designed to induce a breach or interruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004). Those elements are satisfied here.

First, Zynga entered into EIACAs and Termination Certifications with

1 Maietti and Barlach in which they agreed that, for a period of one year after their  
 2 employment ended, they would not directly or indirectly solicit, induce, recruit or  
 3 encourage Zynga employees to resign. (Esposito Decl. ¶ 23, Exhs. B-E.) Such  
 4 agreements are enforceable under California law. *See Loral Corp. v. Moyes*, 174  
 5 Cal. App. 3d 268, 279 (1985) (holding that a one-year restriction on interfering with  
 6 or raiding employees is enforceable); *Arthur J. Gallagher & Co. v. Lang*, C 14-  
 7 0909 CW, 2014 U.S. Dist. LEXIS 71286 (N.D. Cal. May 23, 2014) (enforcing an  
 8 agreement not to “solicit, induce or recruit any employee of [Gallagher] or its  
 9 affiliates to leave the employ of [Gallagher] or its affiliates”); *MSC Software Corp.*  
 10 *v. Altair Engineering, Inc.*, No. 2:07-cv-12807, 2014 U.S. Dist. LEXIS 134165  
 11 (E.D. Mich. Sept. 23, 2014) (enforcing an agreement governed by California law  
 12 not to “solicit, attempt to hire as an employee or consultant or otherwise attempt to  
 13 persuade any other employee” to leave the employer).

14 Second, Zynga has performed all of its obligations under each of these  
 15 agreements. (Esposito Decl. ¶ 24.) In fact, Maietti and Barlach are no longer  
 16 employed by Zynga. (*Id.*) Zynga’s obligations have been fully performed, whereas  
 17 Maietti and Barlach owe continuing obligations to Zynga under their contracts.

18 Third, Scopely was aware of Maietti’s and Barlach’s obligations not to  
 19 interfere with Zynga’s employment relationships, yet actively induced the breach of  
 20 those obligations. When Barlach accepted Scopely’s job offer, he offered to help  
 21 Scopely in its solicitations of Zynga’s workforce. Scopely responded: “*Thanks!! I*  
 22 *was saving that for your first day! LOL I would be happy to hear about anyone you*  
 23 *think I should be trying to speak with. Obviously I know you have the clause about*  
 24 *not taking people so I am always careful ☺*” (Maugeri Decl. ¶ 26, emphasis  
 25 added.) In those few short words, Scopely admitted that it was aware of Barlach’s  
 26 obligations, was planning to ask Barlach to violate them, and expressly approved of  
 27 Barlach doing so. Scopely knowingly induced Barlach’s breach.

28 Fourth, there is circumstantial evidence of actual breach—at least enough for

1 expedited discovery and an order to show cause why Defendants should not be  
 2 preliminarily enjoined. Because Scopely is “careful” to violate the agreements only  
 3 in secret, and because Zynga has not yet conducted any discovery, Zynga cannot  
 4 definitively prove that Scopely and Barlach followed through on their agreement to  
 5 have Barlach assist in interfering with Zynga’s employment relationships. For the  
 6 same reason, Zynga cannot yet prove that Scopely made the same request of other  
 7 former Zynga employees, including Maietti, on their first day (as it planned to do  
 8 with Barlach). However, the timing of Scopely’s solicitations suggest that is  
 9 precisely what happened. The day after Maietti signed a Termination Certification  
 10 in which he agreed not to directly or indirectly solicit Zynga employees, Scopely  
 11 solicited Zynga’s Lead Product Manager, Josh Park, with whom Maietti worked  
 12 closely. (Park Decl. ¶¶ 3, 6.) After Barlach agreed to assist Scopely target Zynga  
 13 employees, Scopely solicited two other key players in Zynga’s Slots group, Chuck  
 14 Hess, Chief Technology Officer, Slots, and Matthew Copeland, Divisional  
 15 Executive Producer, Slots, and hired Heck and Hou from the Slots group.  
 16 (Koenigsberg Decl. ¶ 26; Esposito Decl. ¶¶ 18, 19; Maugeri Decl. ¶ 26.) Notably,  
 17 Scopely solicited Hou within four days of Barlach’s resignation. (Maugeri Decl.  
 18 ¶ 40.) Between the fact that Defendants discussed violating the non-solicitation  
 19 agreements and the fact that solicitations actually occurred shortly thereafter, there  
 20 is enough evidence to merit discovery and an order to show cause.

21 Fifth, Zynga has been damaged by Defendants’ interference with its  
 22 employment relationships, and it could suffer even greater losses if Defendants are  
 23 not enjoined, as discussed immediately below.

## 24 **2. Zynga Faces Irreparable Harm.**

25 The disruption of Zynga’s employment relationships constitutes irreparable  
 26 harm. Once an employee resigns, the Court cannot compel that employee to rejoin  
 27 Zynga. And, in any event, the damage is done—at the time employees leave, their  
 28 absence causes an immediate disruption in Zynga’s operations.



1       The Ninth Circuit has “recognized that intangible injuries, such as damage to  
 2 ongoing recruitment efforts and goodwill, qualify as irreparable harm.” *Rent-A-  
 3 Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th  
 4 Cir. 1991) (“we have also recognized that intangible injuries, such as damage to  
 5 ongoing recruitment efforts and goodwill, qualify as irreparable harm.”). That is  
 6 the case here. Four Zynga employees have resigned to join Scopely since July  
 7 2016. (Koenigsberg Decl. ¶ 26.) These employees occupied key positions, and  
 8 their abrupt departures have caused disruptions in Zynga’s operations. (*Id.*) One of  
 9 the departed employees, Heck, deleted more than 24,000 digital files and folders in  
 10 the last month of his employment, after referencing articles entitled, “How to erase  
 11 my hard drive and start over” and “How to Erase a Computer Hard Drive - How To  
 12 Articles.” (Maugeri Decl. ¶¶ 31-32.)

13       Defendants’ raiding of Zynga’s workforce has already caused significant  
 14 disruptions, and further raiding will compound those problems by removing key  
 15 employees from important Zynga games. (Koenigsberg Decl. ¶ 26.) Accordingly,  
 16 Zynga brings this application to prevent irreparable harm.

17       Maietti and Barlach expressly agreed in Section 16 of their EIACAs that “in  
 18 the event of a breach or threatened breach of this Agreement by me the Company  
 19 may suffer irreparable harm and will therefore be entitled to injunctive relief to  
 20 enforce this Agreement. (Esposito Decl. ¶¶ 10, 17, Exhs. B at § 16, D at § 16.)  
 21 Courts repeatedly have held that a stipulation to irreparable harm by the party to be  
 22 enjoined is sufficient to satisfy irreparable harm. *See, e.g., Am. Impex Corp. v. Int’l*  
 23 *Ace Tex, Inc.*, 2009 U.S. Dist. LEXIS 113103, \*7-8 (C.D. Cal. 2009) (“Plaintiff has  
 24 also demonstrated a likelihood of irreparable harm, since the parties expressly  
 25 acknowledged in the Settlement Agreement that any breach would cause immediate  
 26 and irreparable injury.”), *Cirrus Holding Co. v. Cirrus Indus., Inc.*, 794 A.2d 1191,  
 27 1209 (Del. Ch. 2001) (“This Court has repeatedly held that contractual stipulations  
 28 as to irreparable harm alone suffice to establish that element for the purpose of

issuing preliminary injunctive relief.”); *Marco & Co., LLC v. Deaconess/Billings Clinic Health Sys.*, 954 P.2d 1116, 1118-19 (Mont. 1998) (same).

### 3. The Balance Of The Hardships Favors Relief.

Zynga only has one workforce, and Defendants’ targeted raiding of that workforce causes significant damage. By contrast, Scopely has the whole world’s labor force from which to draw in growing its own business. The disruption to Zynga’s business thus outweighs any impact of an injunction on Defendants.

In similar circumstances, the court in *Loral Corp.* held that an employee-raiding covenant should be enforced: “The restriction presumably was sought by plaintiffs in order to maintain a stable work force and enable the employer to remain in business. This restriction has the apparent impact of limiting [defendant’s] business practices in a small way in order to promote [plaintiff’s] business.” 174 Cal. App. 3d at 280. The result should be the same here.

### 4. The Public Interest Favors Relief.

“[T]he public interest is served when defendant is asked to do no more than abide by trade laws and the obligations of contractual agreements signed with her employer.” *Henry Schein, Inc.*, 2016 U.S. Dist. LEXIS 76038, at \*10 (citing *Bank of Am., N.A. v. Lee*, 2008 U.S. Dist. LEXIS 110410, at \*7 (C.D. Cal. Sept. 22, 2008)). Maietti and Barlach expressly agreed that their promises could be enforced by way of injunction. (Esposito Decl. ¶¶ 10, 17, Exhs. B at § 16, D at § 16.) The public interest favors holding them to their word.

## IV. CONCLUSION

Zynga requests that Defendants be immediately restrained from using or disclosing Zynga’s trade secrets, including all of the digital files taken by former Zynga employees now working at Scopely. Zynga further requests that Defendants be ordered to show cause why such a preliminary injunction should not issue pending trial, and that they additionally be ordered to show cause why they should not be preliminarily enjoined from violating their non-solicitation agreements.



1  
2 Dated: November 29, 2016

O'MELVENY & MYERS LLP

3 By: /s/ Eric Amdursky

4 Eric Amdursky  
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